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86-874

Supreme Court, U.S.
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SUPREME COURT # _____

SUPREME COURT OF THE UNITED STATES

OF AMERICA

ROGER DALE PITTMAN, :

PETITIONER:

VS. :

STATE OF TENNESSEE, :

RESPONDENT:

ON APPEAL FROM

THE SUPREME COURT OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The central issue presented by the Petitioner's Petition to this Honorable Court is this:

Did the Tennessee Supreme Court err in affirming the judgment of the Tennessee Court of Criminal Appeals in finding that the Trial Court did not err in its refusal to admit the affidavits of jurors into evidence at the hearing on the Motion for Judgment of Acquittal or, in the Alternative, For a New Trial, and in its finding that the Trial Court did not err in its overruling of said Motion where the Trial Court lacked both subject matter jurisdiction and venue, as reflected in said affidavits?

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STATE OF TENNESSEE
IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

ROGER DALE PITTMAN, :
PETITIONER:
VS. :#_____
STATE OF TENNESSEE, :
RESPONDENT:

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE
UNITED STATES OF AMERICA:

The Petitioner, Roger Dale Pittman, respectfully petitions this Honorable Court for the issuance of a writ of certiorari so that the judgment of the Supreme Court of the State of Tennessee, dated August 4, 1986, may be reviewed and reversed.

For the purposes of this Petition, the parties will be referred to by name or by their respective postures in this Court; that is, Roger Dale Pittman as the Petitioner, and the State of Tennessee as the Respondent.

As the record is in two (2) parts, and not consecutively numbered, the abbreviation R will indicate a reference as to what is commonly referred to as the technical record and T will indicate a reference to the transcript of the evidence. As the transcript is in three (3) volumes not consecutively numbered, the designation T-I, T-II, and T-III will be used.

UNOFFICIAL REPORTS OF THE OPINIONS

DELIVERED IN THE COURTS LISTED BELOW:

COURT OF CRIMINAL APPEALS OF TENNESSEE

SUPREME COURT OF TENNESSEE

STATEMENT OF JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked pursuant to 28 USC §1257(3) because a right or privilege is claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Article III, Section 2, Clause 3 of the Constitution of the United States:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed..."

B. Fifth Amendment to the Constitution of the United States:

"No person shall be . . . . deprived of life, liberty, or property, without due process of law . . ."

C. Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

D. Fourteenth Amendment to the Constitution of the United States:

". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. PROCEDURE

The Petitioner herein was indicted on six counts of aggravated rape and one count of assault to rape on May 7, 1984 (R.4-6). After a three day trial, the Petitioner was found guilty of sexual battery on Count 1, and was found not guilty on all other counts (R.78). A Motion for New Trial or Motion for Acquittal was filed on March 22, 1985. Said Motion was based on the fact that nine (9) of the twelve (12) jury members signed affidavits to the effect that the jury members found the Petitioner guilty

of sexual battery based upon his admission in testimony of certain acts that took place with an alleged victim in his mobile home residence in Corinth, Alcorn County, Mississippi, on the afternoon of February 4, 1984, and that as such the Honorable Court of Hardeman County, Tennessee, had no jurisdiction in this matter. Said affidavits were attached to the Motion for New Trial and as such became a part of the technical record (R.87-110).

On March 27, 1985, said Motion was overruled. Upon appeal to the Court of Criminal Appeals of the State of Tennessee, the Petitioner argued that the Trial Court should properly have

considered the facts set forth in said affidavits and taken into consideration the testimony of the jury foreman, who was present at the hearing on said Motion. Said affidavits reflected that eleven (11) of the jurymen wished to acquit the Petitioner on all charges, but due to the insistence of one (1) jury member that the Petitioner "be convicted of something," the Tennessee jury as a whole determined to convict the Petitioner on the charge of sexual battery based on his activities in Corinth, Alcorn County, Mississippi. The Petitioner further asserted that based upon the information set forth in said affidavits, the conduct or act for which the Petitioner was convicted took place in the State of Mississippi, and as such the Trial Court was lacking in both subject matter jurisdiction and venue.

The Tennessee Court of Criminal Appeals held in its opinion filed April 9, 1986, that the Trial Court did not err in overruling Petitioner's Motion for New Trial. The Court did not reach the Petitioner's alternative argument with regard to the jurisdictional question. In its opinion on Petition to Rehear filed May 1, 1986, the Court of Criminal Appeals of Tennessee rejected the Petitioner's reasoning "as to his oblique venue question," and denied the Petitioner's Petition to Rehear.

Petitioner's Application for Permission to Appeal to the Supreme Court of Tennessee was denied per curiam in an opinion filed August 4, 1986.

B. EVIDENCE

In a three day trial, the two (2) alleged rape victims, seventeen (17) year old Janette Barber and fifteen (15) year old Leah Gregory, testified that

while running away from their home in Florence, Alabama, and, in fact, on the second day of their trip, they were picked up hitchhiking by the Petitioner, Roger Dale Pittman, and two of his friends, Ray Sego and Mike Merrill (T-I, 3-11). After stopping at a church and smoking marijuana, the Petitioner dropped off Sego and Merrill, and proceeded on Highway 72 going west (T-I, 14-15). The three then went to a large trailer in the woods in Mississippi, where the Petitioner got out and went inside (T-I, 15-16). Conflicting testimony was given as to whether or not the two girls went in the trailer (T-I, 15-16, T-I, 131-132). According to the testimony of the alleged victims, the Petitioner then took them to a logging

road in a remote area of Tennessee, and raped them for some four and one-half (4 1/2) hours (T-I, 16-28).

On cross-examination, Leah Gregory testified that she, Barber and the Petitioner went to a trailer (T-II, 85-86), where Barber went inside (T-II, 89). She further testified that she saw a television, a couch, a table, a clock radio, and some "little doodads" in this trailer (T-II, 88).

Taking the stand in his own defense, the Petitioner testified that in February, 1984, he was living in Corinth, Mississippi, with his wife, Lois M. Pittman, in a mobile home. The Petitioner described the furnishings of his trailer, including a television, a couch, a clock radio, and several small items his wife had collected, including little brass statues and small ceramic statues (T-III, 10). The Petitioner

testified that he and the two alleged victims proceeded to his house trailer in Corinth, Mississippi, for the purpose of obtaining rolling paper to roll additional marijuana cigarettes upon the request of the two girls (T-III, 30). The Petitioner further testified that the parties smoked several marijuana cigarettes while watching television. One of the females began making comments on needing money, and stated that they had noticed that the Petitioner had some money on him. The Petitioner further testified that the two females seemed to him from his experience to be prostitutes. According to the Petitioner's testimony, the parties came to an agreement that certain sexual acts would be performed for money. Petitioner stated that he then gave Ms. Barber a $100 bill, which she stuck in her pocket (T-III, 34-36). Ms. Barber

and the Petitioner proceeded to the Petitioner's bedroom, where both got undressed and began sexual foreplay. When the Petitioner rolled on top Ms. Barber, she began crying, which upset the Petitioner who ceased his attempts at sexual intercourse (T-III, 36). The Petitioner then reached into Ms. Barber's pocket and retrieved the $100 bill that he had given her. The two girls then requested that the Petitioner take them out of the town of Corinth, Mississippi, and agreed that they would pay for a certain amount of gas to be put in his truck. While driving down Highway 57, the Petitioner stated to the girls that he needed to urinate. The two girls then suggested that he pull off the highway but he stated that there was a steady stream of traffic. He eventually pulled off onto a gravel road in a somewhat isolated area. When he

returned to his truck, the girls were smoking another marijuana cigarette. The Petitioner informed them that he needed to leave immediately to pick up his wife. At that point, one of the girls got out of the pickup, but Ms. Barber refused to leave the truck. She then informed the Petitioner that he would take the parties all the way to Hot Springs, Arkansas, and give them money or they would tell the authorities that he had raped them. The Petitioner testified that at that point he pushed Ms. Barber out of the truck and left the site immediately (T-III, 37-40).

The Petitioner in his testimony denied performing any sex acts with the two girls except the acts testified to which took place with Janette Barber in his trailer in Corinth, Mississippi, which involved the sex for money plan

upon which the parties had agreed (T-III, 40-41).

CONTENTIONS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

A. After the Petitioner's conviction on the offense of sexual battery, through a newspaper account of the trial, it came to the attention of counsel for the Petitioner that jury members had found the Petitioner guilty of sexual battery based upon his admission in testimony of certain acts which took place with the alleged victim, Janette Barber, in his mobile home residence in Corinth, Alcorn County, Mississippi (i.e. his "playing around with her" in bed regarding their agreement for "sex for money"). After receiving confirmation of this report through discussions with the jury foreman, as well as other jurymen, counsel for the Petitioner prepared affidavits setting forth the substance

of his conversation with the jury foreman and proceeded to inquire of the remaining jurors relative to this matter requesting that they examine the affidavits and attest to the substantial accuracy of same by executing them under oath. Nine (9) of said jurors did execute this affidavit, which were made part of the technical record by their attachment to the Motion for Judgment of Acquittal, or in the alternative, Motion for New Trial (R.87-110).

Before the Honorable Court of Criminal Appeals of the State of Tennessee, the Petitioner argued that the facts set forth in said affidavits, as well as the proffered testimony of the jury foreman, should have been considered by the Trial Judge as both reflect alleged conduct which does not essentially inhere to the verdict as an overt act open to the knowledge of all

the jury, and not alone within the personal consciousness of one of them. Mattox v. United States, 146 U.S. 140, 148-149, 13 S. Ct. 50, 52, 36 L.Ed. 917 (1892). The Mattox case held that the affidavits of jurors will be received for the purpose of avoiding a verdict, to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict itself.

In affirming the Trial Court's refusal to consider these affidavits, the Court of Criminal Appeals cited the Tennessee Supreme Court case of State vs. Blackwell, 664 S.W.2d 686 (1984). The Blackwell case affirmed an earlier decision by the Court of Criminal Appeals, Montgomery vs. State, 556 S.W.2d 559 (1977). In the Montgomery case, the Tennessee Court of Criminal Appeals approved the State of

Tennessee's adoption of Rule 606(b) of the Federal Rules of Evidence. This rule provides that no juryman may testify to any matter or statement occurring the course of the jury's deliberations affecting jury minds or emotions regarding mental process except where there has been a showing of extraneous prejudicial information or outside influence.

The Court of Criminal Appeals upheld the Trial Court's decision not to take these affidavits into consideration although the Petitioner's brief before said Court pointed out that the Notes of Advisory Committee on Proposed Rules to the Federal Rules of Evidence, Rule 606(b) state that "This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity." (Federal Criminal Code and Rules, 1986 edition, West Publishing

Co., p. 229) According to a footnote in the Blackwell case, the Tennessee rule with regard to the admissibility of evidence where a jury reached its verdict by virtue of an antecedent agreement to be bound by a quotient or majority result is expressly not effected by adoption of the Federal Rule of Evidence 606(b). (See Olens v. Schockett, 31 TN App. 346, 215 effected by adoption of the Federal Rule of Evidence TN 240, 1 S.W. 790, (1886). The affidavits in the instant case indicate that eleven (11) jurors felt acquittal was proper on all charges but due to the insistence of one (1) jury member that the Petitioner be "convicted of something," the Tennessee jury determined to convict the Petitioner on the charge of sexual battery in an effort to avoid a hung jury, based on his actions in Corinth, Mississippi.

The Petitioner maintained in his brief that the affidavits should have been admitted into evidence under this exception.

The Petitioner further argued that according to the case of State vs. Fuino, 608 S.W.2d 892 (1980), affidavits may be admitted to impeach a jury verdict if they reflect a mistake or misrepresentation on the part of the jury. In that case, the Court held that the mistake or misrepresentation made actually constituted extraneous prejudicial information so that the impeachment of the jury verdict was allowed. The Petitioner argued that the mistake of law made by the jury in his case when he was convicted of sexual battery based on evidence of a possible crime committed outside of the boundaries of the State of Tennessee constituted a mistake of law so that

impeachment of the jury verdict should have been allowed. The Petitioner, in his brief, pointed out that jurisdiction was a substantive issue which may never be waived and which may be raised at any time during proceedings.

By the manner in which the issues were framed in its opinion, the Court of Criminal Appeals failed to adjudicate on the merits of the jurisdictional question which is the constitutional issue at the heart of this Petition for Writ of Certiorari. The Tennessee Court of Criminal Appeals framed the first issue as being whether the Trial Court erred in ruling that the jury could not impeach its own verdict. The Court went on to note that the Petitioner alternatively argued that if the Trial Court did not err in not accepting the testimony of the jurors or awarding a new trial on the basis of the

affidavits, that the verdict was void for lack of jurisdiction. In the Court's own words, "if we answer the initial issue in the negative, we need not reach the appellant's alternative argument." The failure of the Tennessee Court of Criminal Appeals to adjudicate this jurisdictional issue on its merits rises to the status of a constitutional deprivation. The Constitution guarantees the defendant a trial in the state where the crimes have been committed and a jury of that district or state. U.S. vs. Keebler, (1982), C.A. 4 M.D., 667 F.2d 452, 9 Fed. Rules Evidence Service 897, Cert denied 456 U.S. 961, 72 L.Ed. 2d 485, 102 S. Ct. 2037.

Article III, Section 2, Clause 3 of the Constitution of the United States provides that a trial shall be held in the State where said crimes shall have

been committed. The Sixth Amendment to the Constitution also gives the right of trial by an impartial jury of the state and district wherein the crime shall have been committed. In the instant case, we have a Tennessee jury by their own admission finding the Petitioner guilty of acts which took place in the sovereign State of Mississippi. Such a conviction should not be allowed to stand as it presents a clear violation of the Petitioner's constitutional rights.

In his Petition for Rehearing before the Court of Criminal Appeals, the Petitioner cited the case of Trojan v. Clarke, Tenn. App., an unpublished opinion released at Jackson, October, 1984, a copy of which is attached hereto for the Court's edification. The Trojan case indicated that affidavits of jury members constitute extrinsic evidence

sufficient to show that a jury verdict resulted from misconduct. The Court in the Trojan case held that where jury misconduct is shown by uncontradicted extrinsic evidence (affidavits) to have affected the verdict, a new trial must be granted. In its opinion denying rehearing, the Tennessee Court of Criminal Appeals referred to the Petitioner's jurisdictional argument as being "oblique," and again refused to reach this issue. This denial of the Petition for Rehearing further diluted the Petitioner's constitutional rights in not deciding this constitutional question on its merits.

In the Petitioner's Application for Permission to Appeal to the Supreme Court of the State of Tennessee, the Petitioner cited the case of Marshall v. North Branch Transfer Company, 166 TN 96 (1933). In the Marshall case, the jury

in an accident case discussed insurance at a time "when the members of the jury were not agreed as to the defendant's liability for the plaintiff's injuries." Some of the jurors urged the assumed fact of insurance upon their dissenting fellow jurors as a reason for the surrender of the conclusion they had gained from the evidence. The language is that some of the jurors "kept insisting that on account of the insurance," a verdict for the plaintiff should be agreed to and rendered. The Court held in this case that this was positive misconduct on the part of the jury and that four (4) members of the jury were thereby induced to assent to a verdict against which they had theretofore held out. "A verdict so influenced and brought about should not be permitted to stand." Marshall v.

North Branch Transfer Company at page 521.

The Petitioner pointed out in his brief that nine (9) members of his jury were inducted to assent to a verdict against which they had theretofore held out, as in the Marshall case. The Petitioner also pointed out that the Trojan and Marshall cases are civil cases wherein the remedy for civil wrongs is monetary damages, which surely do not arise to the same constitutional dignity as that "liberty interest to which United States citizens and citizens of Tennessee are entitled." However, the Petitioner's application for permission to appeal to the Tennessee Supreme Court was denied per curiam.

The Petitioner contends that when a Tennessee jury, by its own admission, in effect finds a defendant guilty of a

possible crime committed outside the state borders, such constitutes a deprivation of his right to due process granted him by the 14th Amendment to the Constitution of the United States. If this Petition for Writ of Certiorari is denied, the Petitioner will be deprived of his liberty interest without this constitutional question ever having been adjudicated on its merits.

B. In the Petitioner's Petition for Rehearing filed April 18, 1986, with the Court of Criminal Appeals, the Petitioner set forth the ground that the Court of Criminal Appeals opinion overlooked a material proposition of law postulated by the appellant courts of this State previously, said proposition being that a verdict may always be challenged for lack of jurisdiction. In its opinion on the Petition to Rehear filed May 1, 1986, the Court of Criminal

Appeals summarily states: "We rejected appellant's reasoning as to his oblique venue question in our original opinion and we reject it again here." It is the belief of the Petitioner that based upon the information set forth in the affidavits attached to his Motion for Acquittal or in the alternative, Motion for New Trial, the conduct or act for which he was convicted occurred in the State of Mississippi. As such, the Trial Court was lacking in subject matter jurisdiction.

In his Application for Permission to Appeal, the Petitioner had hoped that this constitutional issue would be reached by the Supreme Court of Tennessee. These hopes were dashed when the Tennessee Supreme Court denied permission to appeal on August 4, 1986. Petitioner urges that in failing to overturn the Trial Court's refusal to

admit these affidavits into evidence, the Tennessee Supreme Court ignored the violation of his Sixth Amendment rights as articulated in U.S. v. Keebler. The failure of the Tennessee Supreme Court to address this constitutional issue amounts to a denial of the Petitioner's due process rights under the 14th Amendment to the Constitution of the United States, and unless corrected by this Honorable Court, such denial will result in a deprivation of the Petitioner's liberty in the State of Tennessee for a crime which he allegedly committed in the State of Mississippi. This is in direct contravention of his constitutional rights, and by failing to adjudicate this issue on its merits, the Tennessee Supreme Court totally ignored the violation of his 6th and 14th Amendment rights, and has sanctioned his unconstitutional conviction.

CONCLUSION

In light of the contentions advanced by the Petitioner, he respectfully prays that this Honorable Court award a writ of certiorari, to the end that his case may be reviewed and reversed, so as to correct the error in the lower courts and to allow him the benefits of the constitutional guarantees to which he is entitled.

RESPECTFULLY SUBMITTED:

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APPENDIX

IN THE COURT OF APPEALS OF TENNESSEE

WESTERN SECTION SITTING AT NASHVILLE

CHERYL S. TROJAN, :

PLAINTIFF/
APPELLANT, :

VS. : DAVIDSON LAW

RUSSELL C. CLARKE, :

DEFENDANT/
APPELLEE, :

From the Circuit Court of Davidson County, Tennessee

The Honorable Hamilton Gayden, Jr., Judge

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MANIER, WHITE,HEROD, HOLLABAUGH & SMITH
Attorneys for Appellee

REVERSED & REMANDED

HIGHERS, J.

NEARN, P.J., W.S. (Concurs)

TOMLIN, J. (Concurs)

granted an additur which was not accepted by the plaintiff, and that the additur could not correct a verdict which was tainted by jury misconduct as shown by uncontradicted extrinsic evidence.

Before trial the plaintiff moved to exclude evidence relating to the manner or circumstances of the accident except as necessary to describe plaintiff's injuries. This motion was denied by the trial court. The plaintiff further moved to exclude any evidence pertaining to whether plaintiff's damages were offset by a collateral source. This motion was granted.

During the trial the defendant was allowed to testify to the facts of the accident, that he did not see the plaintiff's vehicle, that he was remorseful over what had occurred, that he was retired from the military, and that he did not have any type of

This case was tried before a jury on the sole issue of damages after the plaintiff had been granted summary judgment on the issue of liability relating to an automobile accident. The jury returned a verdict in the amount of $100,000.00. The plaintiff moved for a new trial or, in the alternative, for an additur, on the basis that the amount of the award was grossly inadequate to compensate the plaintiff. The trial court suggested an additur to bring the amount of the judgment to $150,000.00, but denied all other grounds for a new trial. The defendant consented to the additur, and judgment was entered for the plaintiff in the suggested amount.

The plaintiff has appealed, alleging that the defendant was allowed to testify to matters which were irrelevant to the issue of damages, that the trial court

employment. In support of the motion for new trial, the plaintiff submitted an affidavit from the jury foreman which stated:

1. I was the foreman of the jury which heard and decided this case.

2. In the deliberations of the jury in reaching the verdict, consideration was given to the circumstances of the collision which caused the injuries to Ms. Trojan.

3. In the deliberations of the jury in reaching the verdict, consideration was given to the financial effect that any award of compensatory damages would have on the defendant Russell Clark since it was shown that Mr. Clark was a retired military officer and had not been employed since his retirement. It was a concern of several of the jurors that the award not be such as to force Mr. Clark into bankruptcy.

4. In the deliberations of the jury in reaching the verdict, consideration was given to the fact Ms. Trojan was working at Bituminous Insurance Company and her medical insurance through such employment would assist in paying her past and future medical expenses.

At the hearing on the motion for new trial, the defendant produced a separate affidavit from the jury foreman which said:

1. That I previously have given an affidavit in this case to plaintiff's counsel dated July 8, 1983, and I reaffirm the statements made in that affidavit.

2. I further state and explain that while the issues mentioned in my previous affidavit were considered by the members of the jury, consideration was given to all the facts presented to

it by the proof, and those issues mentioned in my first affidavit were not the deciding issues, nor did they unduly influence the result of the jury's verdict, as observed by me as foreman.

3. Testimony by the defendant, Russell Clarke, and statements made by his attorney in final argument, in no way worked as an undue influence on the jurors in reaching their decision.

4. The jury award was definitely the consensus of all twelve jurors after serious consideration was given to all issues and I was then and am now satisfied as to the amount of the jury's award.

In McCall v. Waer, 487 S.W.2d 308 (Tenn. 1972), the Supreme Court held that since a defendant can refuse an additur and have a new trial, the granting of an additur does not impinge upon the defendant's right to a trial by

jury. The Court went on to say: "We recognize that, should a plaintiff disagree with the amount of the additur, and demand a new trial . . . a serious question would be presented." 487 S.W.2d at 310-11. This matter was further addressed in Kaiser v. Cannon, 529 S.W.2d 235 (Tenn. App. 1975), wherein Judge Drowota (now Justice Drowota) stated:

> In summary, if the verdict of the jury is the result of misconduct, such as passion,prejudice or caprice, then the aggrieved party has not had a jury trial as contemplated by the constitutional guaranty and such denial of a jury trial may not be constitutionally corrected by an additur or remittitur not accepted by both parties.

529 S.W.2d at 244. It would appear to be axiomatic that a verdict which is tainted by jury misconduct cannot be corrected or made whole by an adjustment either upward or downward by the trial court.

In Pitts v. Exxon Corporation, 596 S.W.2d 830 (Tenn. 1980), the Supreme Court criticized the Kaiser decision insofar as it suggested that passion, prejudice, or caprice on the part of the jury could be inferred from the size of the verdict alone. The Court said:

> We are unwilling to concur in that decision, insofar as it embraces verdicts said to result from passion, prejudice or caprice, grounded solely on the size of the verdict, unaccompanied by any extrinsic evidence of passion, prejudice or caprice.

596 S.W.2d at 835. The Court, however, did not retreat from the holding of Kaiser with respect to the effect of jury verdicts tainted by misconduct. The Court went on to say: "Of course, any verdict shown to be tainted by any misconduct of one or more jurors that taints or corrupts the verdict, can only be cured by a new trial." Ibid.

Jury verdicts, therefore, that are either excessive or inadequate may be cured in the trial court by means of remittitur or additur, but verdicts which are tainted by jury misconduct, which manifested by extrinsic evidence, cannot be corrected by an adjustment of the size of the verdict and, unless accepted by both parties, there must be a new trial.

Whether the plaintiff is entitled to a new trial where the trial court has suggested an additur which the plaintiff regards as inadequate, is an issue reserved by the Supreme Court which we need not discuss here. See Pitts v. Exxon Corporation, supra.

The question before us is whether the affidavits of the jury foreman are extrinsic evidence sufficient to show that the jury's verdict resulted from misconduct. In Wilson v. Renfroe, 540

S.W.2d 263 (Tenn. App. 1976), the Court considered a case where there were conflicting affidavits from the jurors on the question of whether the jury's discussion of insurance affected its verdict. Writing for the Court, Judge Nearn discussed the case of Marshall v. North Branch Transfer Co., 166 Tenn. 96, 59 S.W.2d 520 (Tenn. 1933), in which uncontradicted affidavits from jury members were used to impeach the verdict. In the Wilson case, however, there were counter affidavits filed, concerning which the Court held:

> Since counter affidavits are filed we cannot presume that those "facts" averred or testified to which are contrary to the verdict and the counter affidavits are true. We must presume that such controverted averments are not true. Otherwise, every verdict will be subject to a later trial by affidavits with a resulting opportunity for great mischief.

540 S.W.2d at 267.

In the case before us, there are no counter affidavits and no affidavits at all except those produced from the jury foreman. In the first affidavit, he stated that consideration was given by the jury to the effect of any award for damages upon the financial status of the defendant, and consideration was also given to the fact that the plaintiff was employed by an insurance company and that her medical insurance would offset her losses and expenses. In the second affidavit, the juror reaffirmed all that he had said in his first affidavit. We do not see any contradictions between the two documents and therefore we may presume that the averments contained in both documents are true to the extent that these statements were within the personal knowledge of the affiant.

In the second affidavit, the jury foreman declared that the issues

improperly considered by the jury did not "unduly influence the result," which, of course, suggests that consideration of these matters did somewhat influence the jury's deliberations. Under Rule 36 (b), T.R.A.P., it is required only that the error "more probably than not affected the judgment." Since the cumulative effect of both affidavits leads to the conclusion that the jury was influenced by its consideration of the matters in question, we believe the test of Rule 36(b) has been met.

In this case the plaintiff sought to exclude all evidence except that which had a bearing upon the damages sustained by the plaintiff. This was the only question at issue in the trial. The trial court denied the motion and allowed the defendant to testify that he was not employed, that he was following

another motorist's directions in waving him on when the collision occurred, and that "Lord knows I wouldn't do it again. That's just about all you can say in a case like that where you get caught following somebody else's instructions." These statements were all irrelevant in a case where summary judgment had been granted on the issue of liability and the only question to be considered by the jury was the amount of damages to be awarded. That the jury considered the financial effect of their award upon the defendant is not denied. It is clear that this misconduct on the part of the jury had a bearing upon the verdict rendered.

We hold that where jury misconduct is shown by uncontradicted extrinsic evidence to have affected the verdict, an additur not approved by both parties

will not cure the misconduct and a new trial must be granted.

For the reasons stated, the judgment of the trial court is reversed and the cause is remanded for a new trial. Costs of appeal are adjudged against the defendant.

/s/ Highers, J.

/s/ Nearn, P.J., W.S.

/s/ Tomlin, J.

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE, :

Appellee, :

VS. :HARDEMAN CRIMINAL

ROGER DALE PITTMAN, :

Appellant.:

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF ROGER DALE PITTMAN

Upon consideration of the application for permission to appeal and brief in support thereof of Roger Dale Pittman, the answer of the State of Tennessee, the opinion of the Court of Criminal Appeals and the record in this cause,

Permission to appeal is denied at the cost of appellant.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS

OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE	:	
Appellee	:	
VS.	:	C.C.A. No. 1
ROGER DALE PITTMAN,	:	HARDEMAN CRIMINAL
Appellant	:	(#4643)

OPINION ON PETITION TO REHEAR

There is a petition for rehearing before the Court which the appellant brings pursuant to Rule 9 of the Rules of Appellate Procedure. At the outset, it shall be noted that rehearings are controlled by Rule 39 of our Rules of Appellate Procedure.

The first argument: The Court did not, as urged, incorrectly state facts

in its affirming opinion. What the appellant overlooks is detailed testimony by both victims of sexual activities performed on them occurring in Tennessee.

The second argument: Our opinion does not in any manner, as urged by appellant, conflict with Trojan v. Clarke, Tenn. App., an unpublished opinion released at Jackson, October, 1984, or Littrell v. Smith, 311 S.W.2d 204 (1958), or Marshall v. North Branch Transfer Co., 166 Tenn. 96 (1933). A cursory reading of those authorities reflects that "extrinsic" evidence voids a jury verdict. This is the same principle of law we relied on in upholding the trial court's judgment since no extrinsic evidence was presented to the jury in this record. Rather than edifying the Court, as appellant states, the cited opinions

bolster the Court's affirmation. Further, the authorities cited are not new and no reason is given why these authorities were not called to the Court's attention in appellant's original brief.

The third argument: We rejected appellant's reasoning as to his oblique venue question in our original opinion and we reject it again here.

Summed up, nothing new, or overlooked, or incorrectly decided has been set forth in this petition. The petition is accordingly denied. The costs are assessed against appellant.

/s/ Robert K. Dwyer,
JUDGE

Concur:

/s/ Charles H. O'Brien, Judge

/s/ Joe D. Duncan, Judge

IN THE COURT OF CRIMINAL APPEALS

OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1985

STATE OF TENNESSEE	:
Appellee	: C.C.A. #1
	: HARDEMAN COUNTY
VS.	: Hon. Herman L. Reviere
	: Presiding Judge
ROGER DALE PITTMAN,	:
Appellant.	: (Sexual Battery)

For Appellant:

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For Appellee:

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Paul G. Summers
District Atty.
General
Somerville, TN

J. Kerry Blackwood
Asst. District Atty.
General
Somerville, TN

OPINION FILED: APRIL 9, 1986

AFFIRMED: Robert K. Dwyer,Judge

OPINION

The jury acquitted appellant of all but the first count of a seven-count indictment. He was convicted of committing the offense of sexual battery, T.C.A. §39-2-607, and sentenced by the trial court as a Range I standard offender to confinement for three years.

The four issues raised by the appellant on this appeal of right are summarized by the State as follows: whether the trial court erred in ruling that the jury could not impeach its own verdict.

With no frontal assault on the evidence, it suffices to state the two victims, females aged 15 and 16 years old, ran away from their respective homes in Florence, Alabama, on February 3, 1984. The next day while the two girls were hitchhiking through Mississippi, the appellant picked them

up and ultimately performed various sex acts on the older girl. The appellant testified acknowledging sexual conduct with the oldest girl in his mobile home in Mississippi. He denied, however, any and all sexual activity with the two victims in Tennessee.

The appellant advances that the trial court erred in not hearing, at the motion for judgment of acquittal or new trial, testimony from the jurors who had returned the verdict of sexual battery. He supports his argument with affidavits fron nine jurymen. The basis for the motion for new trial came about as a result of a newspaper article and a chance meeting between appellant's attorney and the jury foreman. Summed up, the affidavits reflect that the jurors based their verdict of guilty on the appellant's admission of sexual misconduct with the oldest girl at his

home in Mississippi. The jurors reasoned that they compromised their verdict in order to avoid a hung jury.

The appellant then alternatively argues that if the trial court did not err in not accepting the testimony of the jurors or awarding a new trial on the basis of the affidavits, the verdict is void for lack of jurisdiction. This argument is based on the affidavits from the nine jurors stating that the verdict was founded on events occurring beyond the jurisdiction of the court; hence, the appellant argues that his motion for judgment of acquittal should have been granted.

If we answer the initial issue in the negative, we need not reach the appellant's alternative argument.

It is clear under the rule governing such matters found in State v. Blackwell, 664 S.W.2d 686 (Tenn. 1984)

that the trial court did not err in overruling appellant's motion for new trial. Summed up, in the best light to appellant, the affidavits reflect that no external influences were imposed on the jury during their deliberations. To the contrary, only internal matters were considered by the jury. The issue is overruled. The judgment of the trial court is affirmed.

/s/ Robert K. Dwyer,
JUDGE

CONCUR:

/s/ Charles H. O'Brien, Judge

/s/ Joe D. Duncan, Judge

IN THE COURT OF CRIMINAL APPEALS

OF TENNESSEE

JACKSON, JANUARY SESSION, 1985

STATE OF TENNESSEE, :

Appellee, :

VS. : No. 1

ROGER DALE PITTMAN, : HARDEMAN COUNTY

Appellant.:

ORDER OF STATE'S MOTION FOR REHEARING

The Motion for Rehearing is denied.

The issuance of the mandate of the Court is stayed for a total of ninety (90) days from August 25, 1986. T.R.A.P. 42(c).

Defendant's present appeal bond in the amount of Fifty Thousand Dollars ($50,000), conditioned as indicated, shall remain in effect for the duration

of the stay of the Court's mandate. T.C.A. §40-11-113(a)(1).

If filing of a Petition for Certiorari in the United States Supreme Court has not been accomplished within the prescribed time the mandate of the Court shall issue immediately.

/s/ Charles H. O'Brien
JUDGE

IN THE COURT OF CRIMINAL APPEALS

OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE,	:	
Appellee,	:	C.C.A. #1
VS.	:	HARDEMAN COUNTY
ROGER DALE PITTMAN,	:	(SEXUAL BATTERY)
Appellant.	:	

ORDER

This cause came on to be heard upon the Petition of the defendant, Roger Dale Pittman, seeking permission to remain on his present appeal bond pending the filing of a Petition for Certiorari to the Supreme Court of the United States. It appears to the court that defendant's present appeal bond is sufficient for the purpose intended,

subject to the condition that said bond is secured in accordance with T.C.A. §40-11-118 - §40-11-122.

IT IS, THEREFORE, ORDERED that the defendant is allowed to remain on his present appeal bond in the amount of $50,000 conditioned as indicated for a period of ninety (90) days. If filing of the Petition of Certiorari to the United States Supreme Court has not been accomplished within the prescribed time defendant's bond shall be revoked and he shall be remanded to custody in accordance with the mandate of the Court.

/s/ Charles H. O'Brien
JUDGE

CERTIFICATE OF SERVICE

I, Karen T. Fleet, hereby certify that I have served a copy of the foregoing Petition on Ann Lacy Johns, Attorney for Respondent, State of Tennessee, by placing a copy of same in the U.S. Mail, Postage Prepaid, and addressed to her at James Roberts Parkway, Nashville, TN, on this the 26th day of October, 1986.

Karen T. Fleet